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No. 89-724

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

STATE OF SOUTH DAKOTA, *et al.*,
Petitioners,

v.

KANSAS CITY SOUTHERN RAILWAY COMPANY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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REPLY BRIEF

ROGER A. TELLINGHUISEN
Attorney General
JEFFREY P. HALLEM
M. BRIDGET RYAN
Assistant Attorneys General
State Capital
Pierre, SD 57501
(605) 773-3215

THOMAS J. WELK
JAMES E. MCMAHON
BOYCE, MURPHY, MCDOWELL & GREENFIELD
Post Office Box 5015
Sioux Falls, SD 57117
(605) 336-2424

GLEN H. JOHNSON
BANKS, JOHNSON, JOHNSON, COLBATH & HUFFMAN
3202 West Main Street
Rapid City, SD 57702
(605) 348-7300

Of Counsel:
DANIEL J. DOYLE
102 Kutz Road
Carlisle, PA 17013
(717) 776-4007

E. BARRETT PRETTYMAN, JR.*
HOGAN & HARTSON
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5685

Counsel for Petitioners

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF AUTHORITIES

CASES Page

Allied Tube & Conduit Corp. v. *Indian Head, Inc.*, 108 S. Ct. 1931 (1988) 8

Associated General Contractors of California, Inc. v. *California State Council of Carpenters*, 459 U.S. 519 (1983) 2, 3

Blue Shield of Virginia v. *McCready*, 457 U.S. 465 (1982) 3

California Motor Transport Co. v. *Trucking Unlimited*, 404 U.S. 508 (1972) 5

Continental Ore Co. v. *Unicon Carbide & Carbon Corp.*, 370 U.S. 690 (1962) 5

ETSI Pipeline Project v. *Missouri*, 484 U.S. 495 (1988) 6

In re Burlington Northern, 822 F.2d 518 (5th Cir. 1987), *cert. denied sub nom. Union Pacific R.R.* v. *Energy Transp. Systems, Inc.*, 484 U.S. 1007 (1988) 7, 8

United States v. *Patten*, 226 U.S. 525 (1913) 5

MISCELLANEOUS

Reports on Seminars conducted by FTC and D.C. Bar Ass'n, 57 ATTRR 819, 820, 822 (Dec. 14, 1989) 2

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REPLY BRIEF

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1. *The Special Status of a Sovereign State*

KCS does not dispute the extraordinary involvement of South Dakota in the ETSI project, all of the many steps the State took to preserve and extend the project, or the detailed recitation in the Petition of what KCS did to defeat the project by engaging in a group boycott and a pattern of abusing judicial and administrative processes in federal, state and local forums.

Instead, KCS argues that there is no statutory foundation and no previous authority to support "a new rule of law" that gives special status to a state plaintiff.

Brief in Opposition ("Oppcert") 7. The statement is correct, but irrelevant. South Dakota has never claimed that States generally should enjoy a special exemption from the normal rules of standing; it claims only that the lower court should not have ignored those special circumstances in this case that distinguish South Dakota from the ordinary commercial supplier.

South Dakota's sovereign status was not important because of some *parens patriae* claim but rather because certain sovereign acts were necessary to create competition in the coal transportation market, because the State's acts were performed to allow it to act more efficiently in its proprietary capacity, and because KCS, recognizing this, directly attacked the State in its sovereign capacity.

This Court is not precluded from holding that South Dakota's status is important for a standing determination in this case simply because the precise issue was not addressed in the statutory language or in congressional debates. The six standing tests set out in *Associated General Contractors of California, Inc.* v. *California State Council of Carpenters*, 459 U.S. 519 (1983), were not specifically sanctioned by Congress either. Moreover, when this Court listed those six factors, it surely did not mean to suggest that lower courts should entirely ignore other factors that might be important in other cases, as the court below did.

South Dakota therefore does not ask for "a new construction" of the private antitrust remedy, as KCS suggests. Oppcert 9.[1] It simply seeks a reasonable application or extension of the *Associated General Contractors*

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[1] Neither does South Dakota express "unhappiness with the level and focus of federal antitrust enforcement." Oppcert 9. The limits of federal enforcement are simply facts, and there has been increasing public discussion of the need to supplement federal efforts. See, *e.g.*, Reports on Seminars conducted by FTC and D.C. Bar Ass'n, 57 ATTRR 819, 820, 822 (Dec. 14, 1989).

tests to accommodate a situation not contemplated in that decision.

2. *The Need to Balance All Relevant Standing Factors*

South Dakota pointed out that the lower court erroneously treated a single issue—participation in the market—as decisive. KCS responds: "South Dakota has markedly mischaracterized the decision below. South Dakota can cite no portion of the decision showing that the Court gave any single factor decisive effect, because the Court did nothing of the sort." Oppcert 10. But when KCS itself then turns to the Court of Appeals' treatment of *Associated General Contractors*' six factors, it argues: the court assumed that the first two "weighed in South Dakota's favor," Oppcert 11; the court "suggest[ed]" that the last two "weighed in KCS' favor," Oppcert 11-12; and so the court "focused" on the remaining two. Oppcert 12. Ignoring one of these remaining two entirely, KCS then says the panel decided that the State's lack of participation in the coal transportation market "necessarily became an important factor." Oppcert 13. Thus, KCS's own recitation shows that this factor was not just important but decisive, which was precisely South Dakota's point.

The lower court decided, in KCS's own words, that "South Dakota was in no different position than any other prospective supplier of inputs to ETSI, *e.g.*, pipe suppliers, banks or labor unions." Oppcert 12-13. But South Dakota was not just another supplier which was indirectly hurt by shots fired in another direction; South Dakota was the direct target of some of the heaviest salvos fired against competition. The lower court entirely ignored this crucial fact because it focused only on the question of South Dakota's actual presence as a competitor, contrary to the mandate of *Blue Shield of Virginia* v. *McCready*, 457 U.S. 465, 472 (1982). The harm to South Dakota was a result of injury not merely to a

competitor but to competition, and this harm was neither speculative nor duplicative.[2]

The lower court further compounded its error by finding that a contract cancellation prompted by illegal activity can cause no antitrust injury if the contract hypothetically might have been cancelled for another reason. App. 19a. KCS does not even attempt to defend this absurd conclusion.

3. *The Need to Look at the Petitioning Activities as a Whole and Give Appropriate Deference to the Jury's Findings*

As outlined in the Petition, Pet. 5-8, KCS here engaged in a campaign for over ten years to destroy potential competition from a coal slurry pipeline. In combination with other railroads, KCS resisted the grant of crossing rights for the purpose of delay, sought to complicate the process of environmental review, challenged the grant of routine permits, filed a lawsuit (the *Andrews* case) to deprive the pipeline of the water needed for its operation, and engaged in a pattern of other petitioning activity that abused judicial and administrative remedies.

The jury heard evidence on all this. It was specifically instructed that KCS could not be liable for its litigation activities if those activities genuinely sought relief, rather than delay, and this instruction has never been challenged by KCS.

Instead, KCS makes the extraordinary argument that because the jury was not asked a specific *question* about

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[2] Neither ETSI nor the utilities could recover on South Dakota's behalf. ETSI was seeking lost profits. The payments to South Dakota were a *reduction* in ETSI's damages and were not considered by the utilities at all, since they were seeking to recover only the increased costs of transportation. The jury calculated the present value of the contract payments, which is far simpler and less speculative than most damage determinations.

sham litigation, it did not decide there had been any. South Dakota set forth in Appendix H of its Petition some of the instructions given to the jury. The jury was told, for example, that "Plaintiff *must prove* that defendant's and other conspirators' involvement in administrative proceedings and litigation concerning the ETSI project were a shame or a pretext *before* those activties *may be found* to have been in violation of the federal antitrust laws." App. 72a (emphasis added). Moreover, "sham" and "pretext" were extensively defined. App. 71a-72a. The jury found the defendants liable for antitrust violations. To ignore these instructions and this finding and to argue that the jury did *not* find KCS's activities to be a sham or a pretext is to assume that the jury totally disregarded the charge given it by the court. This would be tantamount to arguing that the jury did not find a conspiracy because it was not specifically asked which entities formed the conspiracy.

Moreover, KCS suggests that the District Court and South Dakota precluded a review of each individual petitioning activity by rejecting special interrogatories. Oppcert 25-26. The lower court found no error in the District Court's instructions. In addition, KCS' requested interrogatories dismembering the petitioning activities would have been contrary both to *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508 (1972) and to this Court's analysis in *Continental Ore Co.* v. *Union Carbide and Carbon Corp.*, 370 U.S. 690, 699 (1962).[3] The fragmented view, condemned in *Continental Ore* and *California Motor*, is precisely the approach followed by the lower court and defended by KCS in this case. Here, the lower court found first, "as a matter of law," that

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[3] "* * * [P]laintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each. . . . '[T]he character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole,' " quoting *United States* v. *Patten*, 226 U.S. 525, 544 (1913).

KCS's activities outside the *Andrews* litigation "had no significant or proximate causal relation to the cancellation" of South Dakota's water supply contract. App. 27a. Neither the court below nor KCS has made any effort to justify that conclusion with anything in the record. An appellate court is not barred from reviewing the sufficiency of evidence, but a bare assertion is not a review.

The lower court's opinion stated that only "one-third of [KCS's] administrative actions * * * were directly related to the *Andrews* litigation." App. 25a. Two points should be noted. First, it certainly was not unreasonable as a matter of law for the jury to find that KCS's overall campaign of obstruction and delay was responsible for cancellation of the ETSI agreement, not just the *Andrews* decision standing alone. In *Andrews* this Court, after all, assumed that water was available in the Oahe Reservoir for industrial purposes; the only thing standing in the way of its use was a ministerial act, namely the specific approval of the Secretary of the Army.

> The Army Secretary might have [disposed of Lake Oahe water] but has not done so.
>
> * * * *
>
> Certainly if the Executive Branch as a whole wishes to put the water in this reservoir to beneficial use, it may do so simply by complying with the terms of the Act. [*ETSI Pipeline Project* v. *Missouri*, 484 U.S. 495, 506, 509 n.5 (1988).]

Second, even the recitation by the Court of Appeals demonstrates that fully two-thirds of KCS's actions were not *Andrews*-related. This two-thirds was not examined at all by the court, and the bulk of the evidence which formed the basis for the jury's verdict was thus simply ignored.[4]

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[4] KCS's defense of the lower court is relegated to two sentences in a footnote, Oppcert 24 n.23. KCS argues that the court below did not address KCS's post-1981 non-*Andrews* activity because of the court's *ipse dixit* that this activity had no relationship to South Dakota's injury. The jury found to the contrary.

KCS concedes that the "express basis" for the lower court's holding on *Noerr-Pennington* was "KCS' subjective intent." Oppcert 22. But surely if that is the issue, as we agree that it was, the province of the jury was invaded when the Court of Appeals undertook to decide this issue for itself.

After it had cavalierly disposed of the jury's findings, the lower court went on to say that even if KCS's activities outside the *Andrews* litigation "did contribute to the concellation" of the contract, it does not matter because the *Andrews* litigation was protected by the *Noerr-Pennington* rule. App. at 27a. This is a total *non sequitur*, and once again KCS makes no effort to defend it.

4. *The Conflict with Other Decisions*

KCS attempts to distinguish *In re Burlington Northern*.[5] That was a lawsuit against KCS and four other railroads and their parents. One of the issues was whether the very conduct under review here constituted sham. In ruling on discovery matters, the Fifth Circuit stated: "We reject * * * the railroads' contention that the district court is precluded from finding sham by the railroads' partial success in one of the lawsuits [*Andrews*] and their defensive posture in the other lawsuits." 822 F.2d at 521. The reason, the court said (citing a number of authorities), was that "[i]f the defendant's intent was not to influence the government and obtain relief, but rather to harm a competitor through the mere invocation and maintenance of the process, he is not entitled to protection because he is not exercising the right of petition that formed the basis for the decision in *Noerr*." *Id.* at 527. Thus, "success on the merits does not necessarily preclude an antitrust plaintiff from proving that defendant's earlier litigation activities were

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[5] 822 F.2d 518 (5th Cir. 1987), *cert. denied sub nom. Union Pacific R.R.* v. *Energy Transp. Systems, Inc.*, 484 U.S. 1007 (1988).

a sham." *Id.* at 528. This ruling would be inconsistent with that of the court below even if it related to some other set of activities; but in fact that the Fifth Circuit had under review precisely the same activities at issue here. Thus, the Fifth Circuit held that success in *Andrews* did not eliminate the possibility of sham, the Eighth Circuit held that success was the determinative factor in disproving sham, and the conflict could not be more clear.[6]

KCS also attempts to distinguish *Allied Tube & Conduit Corp.* v. *Indian Head, Inc.*, 108 S. Ct. 1931 (1988). Petitioner need not instruct this Court, of course, on the teaching of that case. We would simply point out that we have correctly recited what the opinion stated, and what we quoted was *not* in the portion of the opinion that discussed petitioning private parties but in the portion that discussed governmental entities. *Allied Tube*, therefore, is precisely relevant.[7]

5. *Conclusion*

No amount of legal sophistry can obscure the fact that a once-in-a-lifetime opportunity for a small rural State to develop water resources for all its citizens was cut off by KCS's pattern of anticompetitive conduct. A jury so found. If ever a party had standing to attack these antitrust violations, it is the sovereign State of South Dakota. And as demonstrated by the amicus brief filed

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[6] In addition, it should be noted again that if the key is KCS's "intent," as the Fifth Circuit said in *Burlington Northern*, that is a quintessential jury question, and this jury decided it against KCS.

[7] The opinion in that case states repeatedly that the *Noerr* determination requires a court to consider "the context and nature" of the challenged activities. 108 S. Ct. at 1939, 1940, 1941. KCS distinguishes the case solely because the contexts of the activities were different, and ignores this Court's instruction to consider the nature of the activities as well, which in this case was litigation, not lobbying.

by nine States supporting the grant of certiorari in this case, the issues here are of major concern far beyond the boundaries of South Dakota.

Respectfully submitted,

ROGER A. TELLINGHUISEN
Attorney General
JEFFREY P. HALLEM
M. BRIDGET RYAN
Assistant Attorneys General
State Capital
Pierre, SD 57501
(605) 773-3215

THOMAS J. WELK
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BOYCE, MURPHY, MCDOWELL & GREENFIELD
Post Office Box 5015
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3202 West Main Street
Rapid City, SD 57702
(605) 348-7300

Of Counsel:
DANIEL J. DOYLE
102 Kutz Road
Carlisle, PA 17013
(717) 776-4007

E. BARRETT PRETTYMAN, JR.*
HOGAN & HARTSON
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5685

Counsel for Petitioners

* Counsel of Record